STATE OF MICHIGAN

IN THE SUPREME COURT

ABDUL AL-SHIMMARI,

Plaintiff-Appellee, /Cross-Appellant

vs.

SETTI S. RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, ~~and~~ UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C., and

Defendants-Appellants. /Cross-Appellee

Supreme Court No. _____

Court of Appeals No. 262655

Lower Court No. 04-407162-NH

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PLAINTIFF-APPELLEE'S CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL,

NOTICE OF HEARING, and

CERTIFICATE OF SERVICE

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STATEMENT OF JURISDICTION
IN SUPPORT OF PLAINTIFF-APPELLEE'S CONDITIONAL APPLICATION FOR LEAVE TO APPEAL AS CROSS-APPELLANTS

(1) The Michigan Supreme Court has jurisdiction to review by conditional application for leave to appeal as cross-appellants a decision of the Court of Appeals under MCR 7.302(D)(2), based on the following information.

(2) The cross-application is conditional in the sense that the PLAINTIFF-APPELLEE asks this Honorable Court to deny the Defendants-Appellant's application or, if granted, to grant PLAINTIFF-APPELLEE'S application, also.

(3) Defendants-Appellants seek leave to appeal the Court of Appeals' Opinion, which was rendered on November 1, 2005, reversing both, the Wayne County Circuit Court's Order dated October 22, 2004, which granted Defendant-Appellant's, Setti S. Rengachary, M.D., Motion for Summary Disposition pursuant to MCR 2.116(C)(7), and the Wayne County Circuit Court's final Order dated April 20, 2005, which granted Defendants-Appellants', The Detroit Medical Center, Harper-Hutzel Hospital, and University Neurosurgical Associates, P.C., Motion for Summary Disposition With Prejudice, pursuant to MCR 2.116(C)(7).

(4) A Notice of Hearing has been set for Tuesday, January 10, 2005, by Defendants-Appellants', on their Application for Leave.

(5) Plaintiff-Appellee is submitting this conditional application for leave to appeal as cross-appellants, pursuant to MCR 7.302(D)(2).

STATEMENT OF QUESTIONS PRESENTED

SHOULD THIS COURT GRANT LEAVE TO CROSS-APPEAL TO CONSIDER THE QUESTION OF WHETHER A PARTY WHO ENTERS A GENERAL APPEARANCE, WITHOUT PREVIOUS OBJECTIONS TO THE PROCESS OR RETURN, OPERATES AS A WAIVER OF ANY DEFECTS IN THE PROCESS, INCLUDING THE SERVICE OR RETURN OF THE PROCESS, AND A STIPULATION ENTERED INTO BETWEEN THE PARTIES OR THEIR COUNSEL WITH REFERENCE TO A PENDING ACTION WILL BE REGARDED AS A GENERAL APPEARANCE?

Plaintiff-Appellee says **"YES."**

Defendants-Appellants say "no"

SHOULD THIS COURT GRANT LEAVE TO CROSS-APPEAL TO CONSIDER THE QUESTION OF WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL BARS A DEFENDANT FROM ARGUING OBJECTIONS TO SERVICE OF PROCESS, WHEN THAT DEFENDANT INTENTIONALLY OR NEGLIGENTLY INDUCES THE PLAINTIFF TO BELIEVE THE DEFENDANT IS FIGHTING THE INSTANT PROCEEDING ON ITS MERITS?

Plaintiff-Appellee says **"YES."**

Defendants-Appellants say "no."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(1) PLAINTIFF-APPELLEE relies on "Statement of Material Facts and Proceedings" submitted with PLAINTIFF-APPELLEE'S brief in opposition to Defendants-Appellant's application for leave to appeal.

ORDER BEING APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellee, ABDUL AL-SHIMMARI, seeks leave to appeal from the Michigan Court of Appeals' November 1, 2005 Opinion on the condition of whether this Honorable Court denies or grants the Defendants-Appellants' application and, if granted, to grant leave to Plaintiff-Appellee's application to cross-appeal. A copy of the Court of Appeals' November 1, 2005 Opinion is attached hereto as **EXHIBIT 1**.

In respect to its ruling, the Court of Appeals erred for two reasons: 1) by failing to specifically explain in its November 1, 2005 Opinion, what specific acts of Defendants-Appellants failed to satisfy the two-part test for an appearance stated in Penny v. ABA Pharmaceutical Company, 203 Mich App 178, 511 NW2d 896 (1993); and 2) this matter clearly provides ample evidence and proof in support of finding an appearance was made on behalf of all Defendants-Appellants the instant their authorized Saurbier & Siegan, P.C., attorney began negotiations for a filing extension which was agreed to by Plaintiff-Appellee's counsel upon obtaining a singed Stipulation To Admit Into Evidence All Medical Records Of Abdul Al-Shimmari, specifically signed for "on behalf of all Defendants." (**EXHIBIT 2**) Plaintiff-Appellee requests that this Honorable Court grant this cross-application to consider the question of whether a party who enters a general appearance, without previous objections to the process or return, operates as a waiver of any defects in the process, including the service or return of the process, and a stipulation entered into between the parties or their counsel with reference to a pending action will be regarded as a general appearance.

Due to the Michigan Court of Appeals declining to address the issues of equitable estoppel and whether the return of service was inaccurate because of their dispositive decision that the trial court erred in granting the motion for summary disposition, in their November 1,

2005 Opinion, Plaintiff-Appellee brings this issue forward. This Honorable Court should grant leave to cross-appeal to consider the question of whether the doctrine of equitable estoppel bars a defendant from arguing objections to service of process, when that defendant intentionally or negligently induces the plaintiff to believe the defendant is fighting the instant proceeding on its merits.

Upon granting leave to Plaintiff-Appellee's application to cross-appeal, Plaintiff-Appellee requests that this Honorable Court reverse the holding of the circuit court granting Defendants-Appellants' Motions for Summary Disposition for the reasons stated in this cross-appeal.

STANDARD OF REVIEW

The circuit court granted summary disposition pursuant to MCR 2.116(C)(7), ruling that the statute of limitations barred plaintiff-appellee's claim. In reviewing a grant of summary disposition, an appellate **court must view the evidence in the light most favorable to the nonmoving party, and make all legitimate inferences in favor of the nonmoving party**. *Jackson v. County of Saginaw et. al., 458 Mich 141; 580 N.W. 2d 870 (1998); Skinner v. Square D. Co., 445 Mich 153; 516 N.W. 2d 475 (1994)*. The appellate court reviews this **question of law de novo**. *Blazer Foods, Inc. v. Restaurant Properties, Inc., 259 Mich App 241; 673 N.W. 2d 805 (2003); Pusakulich v. Ironwood, 247 Mich App 80, 635 N.W. 2d 323 (2001); Jackson, supra; Skinner, supra; Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 N.W.2d 21 (1991)*.

ARGUMENT

I. This Court Should Grant Leave To Cross-Appeal To Consider The Question Of Whether A Party Who Enters A General Appearance, Without Previous Objections To The Process Or Return, Operates As A Waiver Of Any Defects In The Process, Including The Service Or Return Of The Process, And A Stipulation Entered Into Between The Parties Or Their Counsel With Reference To A Pending Action Will Be Regarded As A General Appearance.

Plaintiff-Appellee is strongly convinced that the circuit court abused its discretion by denying Plaintiff-Appellee's Motion for Rehearing or Reconsideration, without even justifying or substantiating its decision. The circuit court's decision therefore, does not and cannot involve the idea of choice, of an exercise of the will, of a determination made between competing considerations. There can be no other conclusion reached, but that the lower court's decision is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason, but rather of passion or bias.

A party who enters a general appearance, without previous objection to the process or return, operates as a waiver of any defects in the process, including the service or return of the process, and a stipulation entered into between the parties or their counsel with reference to a pending action will be regarded as a general appearance. *National Coal Co. v. Cincinnati Gas, Coke, Coal & Mining Co., 168 Mich 195, 131 N.W. 580 (1911)Penny v. ABA Pharmaceutical Company, 203 Mich App 178, 511 N.W. 2d 896 (1993); In re Slis, 144 Mich App 678, 683, 375 N.W. 2d 788 (1985).* Stipulation includes letter or agreements not filed of record, including oral agreements amounting to at least a tacit agreement for an extension, but will not include request for extensions not granted. *77 A.L.R.3d 841 (1977).*

It is important to distinguish the differences between an appearance and a pleading, as they are distinct acts. While the filing of a responsive pleading may operate as an appearance, appearing and pleading nevertheless remain two distinct things. An appearance is an act by which a person whom suit has been commenced submits himself to the jurisdiction of the court. *Id.; Dauphin v. Landrigan, 187 Wis. 633, 205 N.W. 557 (1925).*

Michigan case law has helped define an appearance. To appear, should be taken in its generic sense as any act of a party acknowledging jurisdiction of a court or invoking court action on his behalf. *Ragnone v. Wirsing, 141 Mich App 263, 367 N.W. 2d 369 (1985); Rhodes v. Rhodes, 3 Mich App 396, 142 N.W. 2d 508 (1966).* Generally, any action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will constitute a general appearance. *Penny, supra.* Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. *Penny, supra; Ragnone, supra.* While a general appearance by a defendant or his attorney waives defects in service of

process, the general rule is that an unauthorized appearance is ineffective for any purpose. So long as the appearance is authorized, any service of process objections will be deemed waived. *Wright v. Estate of Treichel, 36 Mich App 33, 193 N.W. 2d 394 (1972)*. Therefore, *"a party that submits to the court's jurisdiction may not be dismissed for not having received service of process. MCR 2.102(E)(2)."* *Penny, supra*

The Michigan Court of Appeals in *Ragnone, supra.*, further analyzed this issue as it relates to written and oral communications between opposing counsel. The Court opined that where **defendant's attorney communicated with plaintiff** for the purpose of negotiating a settlement, **wrote a letter seeking an extension of time for filing an answer**, and even attended a scheduled meeting, **these actions constituted a general appearance as the defendant's attorney was aware of the proceedings and demonstrated an intention to appear**. *Id.*

Furthermore, the Supreme Court of Michigan, in *National Coal Co., supra.*, opined that by a voluntary appearance and by consent to a stipulation extending the time within which the defendant should plead, defendant submitted itself to the jurisdiction of the court. A defendant waives any exemption from the process if he does not object seasonably. *Id.*

In the instant case, the Court of Appeals addressed this argument in a footnote stating specifically:

> n3 We note that plaintiff argues that Rengachary waived his right to claim lack of service by failing to object before participating in the suit and that through his attorneys, he entered a general appearance in the trial court by negotiating for a filing extension and for a stipulation regarding evidence. Defendants' attorneys' actions were not sufficient to constitute a general appearance on Rengachary's behalf. A party may still waive his right to object to service if he submits to the court's jurisdiction by entering a general appearance and contesting a suit on the merits. *Penny v ABA Pharmaceutical Company (On Remand)*, 203 Mich. App. 178, 181; 511 N.W.2d 896 (1993).

In respect to its ruling, the Court of Appeals erred for two reasons: 1) by failing to specifically explain in its November 1, 2005 Opinion, what specific acts of Defendants-Appellants failed to satisfy the two-part test for an appearance stated in *Penny, supra;* and 2) this matter clearly provides ample evidence and proof in support of finding an appearance was made on behalf of all Defendants-Appellants the instant their authorized Saurbier & Siegan, P.C., attorney began negotiations for a filing extension which was agreed to by Plaintiff-Appellee's counsel upon obtaining a singed Stipulation To Admit Into Evidence All Medical Records Of Abdul Al-Shimmari, specifically signed for ***"on behalf of all Defendants"*** dated April 6, 2004. **(EXHIBIT 2)**

As previously pled and argued before the circuit court, and one of the legal reasons Plaintiff-Appellee previously filed a Default in the circuit court against all Defendants-Appellants, Plaintiff-Appellee's Counsel had **communications** with Counsel for all Defendants-Appellants, specifically members of Saurbier & Siegan, P.C., where **Plaintiff-Appellee agreed to provide all Defendants a two week extension, specifically from April 1, 2004 to April 15, 2004, to file responsive pleadings, in exchange for and reliance on a signed Stipulation to Admit Medical Records of Plaintiff-Appellee, in the underlying cause of action as to all Defendants**. For the sake of efficiency, the evidences of these communications can be found in the document and all exhibits attached thereto of the *Statement of Material Facts &Proceedings of the "Plaintiff's Application for Interlocutory Leave to Appeal" filed with the Michigan Court of Appeals* . **(EXHIBIT: See Plaintiff's Application for Interlocutory Leave to Appeal filed with the Michigan Court of Appeals)**

It is important to note at this time that Plaintiff-Appellee does not believe it coincidence that Counsel for all Defendants requested an extension from April 1, 2004 to

April 15, 2004. As the court rule clearly states, an individual has 21 days to file responsive pleadings after they are personally served. 21 days after March 11, 2004, the date the returns of service state Dr. Rengachary was served, is April 1, 2004!

Again, as case law is quite clear, it is palpable error to grant Defendants-Appellants motions based on defective service within the Statute of Limitations, when Defendants-Appellants, through the communications and actions of their attorneys, Saurbier & Siegan, P.C., which were authorized, waived any argument Defendants-Appellants might have had. Not only is it clear through the written communications and oral communications that Saurbier & Siegan, P.C. had knowledge of the pending proceedings on behalf of all Defendants, but it is also clear that through these communications, there was complete knowledge and intent to appear on behalf of all Defendants. After all, it was Defendants' Counsel who asked for the extension on March 29, 2004, Plaintiff-Appellee's Counsel not agreeing to an extension without the bargained for exchange of a signed stipulation on behalf of "all Defendants", and then Counsel for the Defendants-Appellants further requesting that Plaintiff-Appellee's Counsel E-mail discovery requests, ***all prior to the filing of Defendants-Appellant's April 16, 2004 motions.*** **Again, it is clear, based on binding case precedent, that through the communications of Saurbier & Siegan, P.C., constituted an appearance on behalf of all Defendants-Appellants, thereby forever waiving all service of process issues.**

As additional evidence of Saurbier & Siegan, P.C.'s appearance on behalf of Defendants-Appellant's, thus, again waiving any service of process issues, is the April 6, 2004 signed Stipulation To Admit Into Evidence All Medical Records of Abdul Al-Shimmari. This signed Stipulation was provided to Saurbier & Siegan, P.C., with the caption as written, and signed ***"on behalf of all Defendants"***, by Bart P. O'Neill, Esq. He has clearly,

again, acknowledged the underlying proceeding and shown a clear and unambiguous intent to appear on behalf of Dr. Rengachary. **The motions filed with the circuit court on April 16, 2004, objecting to service of process, and what the circuit court premised its October 22, 2004 Order on, were *NOT* seasonable objections, since Saurbier & Siegan, P.C., through its actions, had already submitted Defendants-Appellant's to the circuit court's jurisdiction.**

In summary, the Defendants-Appellants started with knowledge of this lawsuit upon receiving a Notice of Intent on September 16, 2003. Next, Scott A. Saurbier of Saurbier & Siegan, P.C., through a correspondence dated November 10, 2003 confirmed that they were the authorized Counsel to represent all Defendants-Appellants. **(EXHIBIT 3)** Upon being personally served with a summons, complaint, and demand for jury trial, voluntary actions on behalf of all Defendants-Appellants was demonstrated when their authorized representative from Saurbier & Siegan, P.C. initiated contact with Plaintiff-Appellee's Counsel requesting a filing extension from April 1, 2004 to April 15, 2004. After a comprehensively bargained for consideration, analogous to a contract between two parties, Counsel for all Defendants-Appellants carefully signed and entered into a stipulation purposely and specifically affecting all Defendants-Appellants. **(EXHIBIT 2)** This stipulation is "...To Admit Into Evidence All Medical Records of Abdul Al-Shimmari", which includes all named Defendants in the Complaint. This knowledge is further imputed upon Saurbier & Siegan, P.C., authorized counsel for Defendants-Appellants, by the fact that they received a list of medical providers of the Plaintiff-Appellee as early as November 24, 2003. **(EXHIBIT 4)** Lastly, it is well established factually, that at no point prior to any of the above actions that took place did any Defendant-Appellant object or utter in any method of communication known to man that the service of

process or return was at question, and now, as we are before the Honorable Michigan Supreme Court, no Defendant-Appellant can prove, say, or even suggest otherwise!

For the above stated reasoning, this cross-application should be conditioned on whether or not this Honorable Court denies or grants the Defendants-Appellants' application and, if granted, to grant leave to PLAINTIFF-APPELLEE'S application to cross-appeal to consider the question of whether a party who enters a general appearance, without previous objections to the process or return, operates as a waiver of any defects in the process, including the service or return of the process, and a stipulation entered into between the parties or their counsel with reference to a pending action will be regarded as a general appearance.

II. This Court Should Grant Leave To Cross-Appeal To Consider The Question Of Whether The Doctrine Of Equitable Estoppel Bars A Defendant From Arguing Objections To Service Of Process, When That Defendant Intentionally Or Negligently Induces The Plaintiff To Believe The Defendant Is Fighting The Instant Proceeding On Its Merits.

Due to the Michigan Court of Appeals declining to address the issues of equitable estoppel and whether the return of service was inaccurate because of their dispositive decision that the trial court erred in granting the motion for summary disposition, in their November 1, 2005 Opinion, Plaintiff-Appellee brings this issue forward.

The doctrine of equitable estoppel rests on broad principles of justice. It is applicable to actions at law and in equity. *Penny, supra.; In re Prichard Estate, 169 Mich App 140, 425 N.W. 2d 744 (1988)*. Estoppel arises where a party, by representations, admission, or silence, intentionally or negligently induces another party to believe certain facts. *Penny, supra.* The other party must not only have justifiably relied on this belief, but also must be subject to prejudice if the first party is permitted to deny the facts upon which the second party relied.

Penny, supra.; Schepke v. Department of Natural Resources, 186 Mich App 532, 464 N.W. 2d 713 (1990).

It is palpable error to grant Defendants-Appellants' motions for summary disposition because of this doctrine. As stated above, estoppel arises where a party, by representations, admission, or silence, intentionally or negligently induces another party to believe certain facts. **Clearly, through the written communications, oral communications, and signed Stipulation, on behalf of "all Defendants", Saurbier & Siegan, P.C., intentionally or negligently, induced Plaintiff-Appellee's Counsel to believe Defendants-Appellants were fighting this underlying proceeding on its merits**. Furthermore, it is plain as day to see that Plaintiff-Appellee not only justifiably relied on this belief, but Plaintiff-Appellee, Abdul Al-Shimmari, will be also subject to prejudice if Defendants-Appellants are permitted to deny that they were going to fight the instant proceeding on its merits, the fact upon which Plaintiff-Appellee's Counsel relied on. **Please remember, Plaintiff-Appellee granted all Defendants-Appellants two weeks to file responsive pleadings, from April 1, 2004 to April 15, 2004. Defendants would have been in Default if this extension was not generously given and this case would have been an issue about damages only.** Why in the world would Plaintiff-Appellee grant an extension, believing Defendants-Appellants would file objections to service of process, rather than fight the instant proceeding on its merits? **ANSWER: They would not!**

Furthermore, it is Plaintiff-Appellee's position that Defendants-Appellants are also equitably estopped from arguing objections to service of process, due to the fact that Defendants-Appellants filed an Answer to the underlying Complaint, wherein they fight the merits of the underlying cause of action. MCR 2.108(C) specifically allows a party 21 days to file a responsive pleading upon a denial of a motion based on MCR 2.116. By the mere filing of an

Answer, rather than wait for the summary disposition ruling, and fighting the merits of the underlying cause of action, Defendants-Appellants have again subjected themselves to the circuit court's jurisdiction and have again forever waived any service of process issue.

CONCLUSION

Plaintiff-Appellee provided the circuit court with evidence sufficient to create a question of fact that Defendants-Appellants were served with process of the underlying cause of action and had notice of the underlying cause of action within any alleged Statute of Limitations; Defendants-Appellants, through the actions and conduct of their attorney, Saurbier & Siegan, P.C., waived any service of process objections they might have had as a legal right to raise; Defendants-Appellants were grossly inadequate with their evidences to negate the returns of service by clear and unequivocal proof; and the circuit court's grant of summary disposition under such circumstances constitutes reversible error.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee requests that this Honorable Court grant this cross-application on the condition of whether this Honorable Court denies or grants the Defendants-Appellants' application and, if granted, to grant leave to PLAINTIFF-APPELLEE'S application to cross-appeal to consider the question of whether a party who enters a general appearance, without previous objections to the process or return, operates as a waiver of any defects in the process, including the service or return of the process, and a stipulation entered into between the parties or their counsel with reference to a pending action will be regarded as a general appearance. In addition, this Honorable Court should grant leave to cross-appeal to consider the

question of whether the doctrine of equitable estoppel bars a defendant from arguing objections to service of process, when that defendant intentionally or negligently induces the plaintiff to believe the defendant is fighting the instant proceeding on its merits.

Upon granting leave to PLAINTIFF-APPELLEE'S application to cross-appeal, Plaintiff-Appellee requests that this Honorable Court reverse the holding of the circuit court granting Defendants-Appellants' Motions for Summary Disposition for the reasons stated in this cross-appeal.

Respectfully submitted,

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